No. 92-515

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE OHIO PUBLIC DEFENDER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT TODD MITCHELL

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INTEREST OF AMICUS CURIAE

Ohio law mandates that the Ohio Public Defender Commission "provide, supervise, and coordinate legal representation at state expense for indigent and other persons." Ohio Revised Code Section 120.01. The commission appoints the Ohio Public Defender, who, among other duties, provides legal representation to indigent defendants in criminal cases at the trial level and at all appellate levels. The Public Defender has an interest in seeing that the constitutional rights of all Ohioans are protected when they are charged with a violation of Ohio law. Foremost among these rights are those protected by the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

In 1991, the Ohio Public Defender undertook the representation of David Wyant, who had been convicted for a violation of Ohio Revised Code Section 2927.12, the state's ethnic intimidation law. As counsel for Mr. Wyant, the Public Defender argued in the Ohio Supreme Court that Mr. Wyant's conviction was voidable under the pertinent provisions of both the Ohio and United States Constitutions. On August 26, 1992, the Ohio Supreme Court rendered an opinion finding Ohio Revised Code Section 2927.12 unconstitutional under both constitutions.

Following that decision, the State of Ohio filed a petition for a writ of certiorari in this Court. *Ohio v. Wyant,* Case No. 92-568. As counsel for Mr. Wyant, the Public Defender filed a brief in opposition asking this Court to deny certiorari. The State's petition is still pending before this Court. There are significant differences between the Ohio ethnic intimidation statute and the Wisconsin statute at issue in the instant case, as well as important questions regarding this Court's jurisdiction to hear the *Wyant* case. Despite these crucial differences, David Wyant has a very real interest in the outcome of the instant case.

As advocates for people who have been or who may be charged with violations of the various ethnic intimidation and bias crime statutes, the Ohio Public Defender and the other public defenders who have subscribed to this amicus brief are also very interested in the outcome of this case. They are concerned that government may dictate what citizens may think by punishing the thoughts of criminal defendants.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

SUMMARY OF THE ARGUMENT

This case is about freedom of thought. Despite the protestations of the State of Wisconsin and its amici, this case is not concerned with Todd Mitchell's conduct. His conduct is sufficiently addressed by sections of the Wisconsin criminal code other than Wisconsin Statutes Section 939.645. It is Mr. Mitchell's thoughts, his motives, which the State deems offensive. But for the content and the viewpoint of his thoughts, Mr. Mitchell could not have received the harsh sentence imposed upon him. In *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), this Court fully addressed the issue raised in this case: the First Amendment forbids government from drawing distinctions between identical acts on the basis of the actor's viewpoint or the content of the actor's thoughts. The principles of *R.A.V.* apply to this case. The doctrine of stare decisis requires the consistent application of those principles. Just as the St. Paul ordinance in *R.A.V.* was facially unconstitutional, so is the Wisconsin statute at issue here.

Statutes such as Section 939.645 inevitably lead to selective enforcement and unequal treatment. Police officers, prosecutors, judges, and juries are forced to become "thought police" as they try to determine which offenses constitute bias crimes and which do not. Young members of historically disempowered groups are far more likely to be prosecuted under these statutes than are members of the majority. For this and other policy reasons, Section 939.645, though well intentioned, will prove to be extremely harmful to those persons it was designed to protect.

Wisconsin Statutes Section 939.645 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it treats persons differently based upon their exercise of First Amendment rights. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). The First

Amendment protects from governmental intrusion an individuals's right to think, believe, and disagree. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). In the criminal context, an offender's motive is the offender's thoughts, beliefs, and ideas. As the Wisconsin Supreme Court noted, an offender's motives are his reasons; they are the "because of" aspect of the underlying conduct. *State v. Mitchell*, 169 Wis. 2d 153, 164, 166, 485 N.W.2d 807, 812, 813 (1992). Through the use of Section 939.645, Wisconsin selectively punishes this thought aspect based on content and viewpoint, treating persons who act "because of" the victim's race or other designated characteristic more harshly than it does those who commit the identical underlying offense "because of" some other, state-approved motive.

ARGUMENT

I. THIS COURT'S DECISION IN R.A.V. v. CITY OF ST. PAUL, MINNESOTA HAS ALREADY DETERMINED THE FIRST AMENDMENT ISSUE PRESENTED BY THE STATE OF WISCONSIN.

This Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), is the starting point for any analysis of Section 939.645. In *R.A.V.*, this Court clarified that even in areas in which government may, consistently with the First Amendment, regulate or punish expression, it may not do so based upon the content or viewpoint of the expression. Thus, although certain categories of expression, such as "incitement to violence" (the category ostensibly at issue in the present case), may be punished, the punishment may not be based upon the government's hostility or favoritism toward the message expressed. *Id.* at 2545.

Not only does Section 939.645 impose additional punishments for an offender's motives (which in itself creates a thought crime), it does so only for motives with a particular content: the only motives punished are those involving "race, religion, color, disability, sexual orientation, national origin or ancestry." As this Court emphasized in *R.A.V.*, "the First Amendment does not permit government to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2547 (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987)). Like the ordinance held unconstitutional in *R.A.V.*, Section 939.645 offends the First Amendment because of its selective punishment of "'bias-motivated' hatred and ... 'virulent notions of racial supremacy.'" 112 S. Ct. at 2548.

The *R.A.V.* analysis and result apply as much to the statute at issue in the instant case as they did to the St. Paul ordinance. When Section 939.645 is laid side by side with the *R.A.V.* decision, the outcome becomes clear: the Wisconsin statute is facially unconstitutional.

Application of the *R.A.V.* decision to this case is more than logical; it is mandated by the principle of stare decisis. This Court should adhere to the precedent it set in *R.A.V.* "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991). The doctrine of stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

In *Payne v. Tennessee,* this Court overruled its previous decisions in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805 (1989). In so doing, the Court noted that those cases were decided by the narrowest of margins; there were spirited dissents in both cases which challenged the basic underpinnings of the decisions; both *Booth* and *Gathers* were questioned by members of the court in later decisions; and they defied consistent applications in the lower courts. *Payne v. Tennessee*, 111 S. Ct. at 2611. None of the flaws this Court found in *Booth* and *Gathers* exist in *R.A.V.* In that case, all nine Justices found that the St. Paul ordinance was unconstitutional. No members of this Court have questioned the *R.A.V.* decision in subsequent cases. The state supreme courts of Ohio and Wisconsin have applied *R.A.V.* in ruling their respective state bias crime statutes unconstitutional. *State v. Wyant,* 64 Ohio St. 3d 566, 597 N.E.2d 450, (1992); *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992). In *State v. Plowman,* 314 Or. 157, 838 P.2d 558 (1992), the Oregon Supreme Court upheld the constitutionality of the Oregon bias crime statute. The Oregon Supreme Court found that in *R.A.V.*, this Court did not expressly rule on the constitutionality under the First Amendment of a statute similar to the Oregon law. *Plowman*, 314 Or. at 168, 838 P.2d at 565. The court distinguished the Oregon statute from those at issue in both *R.A.V.* and *Mitchell*, finding that the rationale supporting neither decision was applicable to *Plowman*. Under the stare decisis principles of *Payne v. Tennessee,* this Court's decision in *R.A.V.* applies to the instant case.

In a society governed by the rule of law, this Court must be faithful to its precedents. *Payne v. Tennessee*, 111 S. Ct. at 2621, (Marshall, J., dissenting). In his dissenting opinion in *Payne*, an opinion in which Justice Blackmun joined and upon which Justice Stevens commented with approval, Justice Marshall noted that the Supreme Court had never departed from its precedents without special justification. *Id.* at 2621. No justifications exist for a departure from *R.A.V.* in the present case. The issue in both cases is the same: punishment of selected thought, content, and viewpoint.

The State of Wisconsin contends that the harm caused by crimes including bias elements is qualitatively different from the harm caused by other crimes. However, that additional harm consists entirely of the offensiveness of the communication to others of the offender's bigoted viewpoint. The same offensiveness, alarm, and sense of disempowerment is caused by bigoted speeches, books, and demonstrations, all of which are indisputedly protected by the First Amendment. Where the same message is communicated by illegal conduct, the message does not shield the conduct. The criminal act may be punished as always, but the offensive message itself does not lose its constitutional protection. Thus, one who burns a flag "by reason of" opposition to government policies may constitutionally be punished for a violation of a public burning law; but the government could not constitutionally upgrade the offense on the basis of the offender's motive for the offense or the message conveyed thereby, despite any additional harm or offensiveness it may create. In *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman,* 494 U.S. 1021 (1990), this Court explicitly acknowledged that flag burnings cause greater and more widespread harm than other unlawful burnings. However, this was only true when the flag was burned in a disrespectful manner. Therefore, this Court held that the statutes at issue impermissibly turned on the defendants' motives and viewpoint, and accordingly this Court struck down both statutes. The Wisconsin Supreme Court struck down Section 939.645 because it, too, is viewpoint-specific.

II. WISCONSIN STATUTES SECTION 939.645 INVITES DISCRIMINATORY ENFORCEMENT AGAINST MINORITIES.

Section 939.645 is an open invitation to arbitrary and discriminatory enforcement. In enacting this law, the Wisconsin legislature failed to establish minimal guidelines to govern law enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972). A law may not delegate basic policy matters to police officers, prosecutors, judges, and juries for resolution on an ad hoc and subjective basis. *Id.* at 108-09. When any underlying offense has been committed, the police officer at the scene must make a determination whether the offender acted "because of" the victim's race or other statutorily proscribed reason. In any given case, the offender's motive can be difficult, if not impossible, to detect. Offenders themselves may be unclear about their motives. Section 939.645 and other statutes of its ilk require law enforcement officers to become "thought police" in rooting out the reasons for an offender's conduct. Section 939.645 will pressure police officers encountering interethnic incidents into imputing bias motives where in fact there were none.

Todd Mitchell's motives, not his conduct or intent, are at issue in this case. As the Supreme Court of Wisconsin correctly found:

> Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection.

State v. Mitchell, 169 Wis. 2d 153, 164, 485 N.W.2d 807, 812 (1992).

Wisconsin's bias crime statute places impermissible burdens on police officers and prosecutors, forcing them to make highly subjective judgments which inevitably lead to selective enforcement. Statutes which target offensive beliefs create an "obvious invitation to discriminatory enforcement." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971). A police officer who encounters an interracial confrontation would naturally be inclined to see that confrontation from the perspective of the combatant who shares the officer's ethnicity. Since most law enforcement officers are majority members, this law will necessarily lead to more arrests of and charges filed against minorities. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 361-62 (1991).

Any time one of the underlying offenses is committed, and the offender and the victim happen to be of different ethnicities, there will be the risk of even well-meaning officers and prosecutors adding a charge of ethnic intimidation as well. Where the actor is suspected of being a racist or an anti-Semite, a police officer could be more likely to investigate and arrest, and a prosecutor to pursue, questionable complaints of an underlying offense, because of the possibility of an additional charge of ethnic intimidation. Indeed, because of our societal consensus that bigots are ignorant, boorish, and even dangerous, it may well be that prosecutors would anticipate an easier time persuading a jury to convict on the more serious charge of ethnic intimidation than they would on the conduct-oriented underlying offense alone. When any of these situations would occur, it is foreseeable that the model statute would actually operate to inflame, rather than improve, ethnic relations.

Even those who support bias crime legislation recognize that the discretion to arrest and prosecute may be exercised on minimal and extremely subjective evidence. "Each particular situation has to be scrutinized by the investigating officers. ... There is a danger where somebody calls somebody a name, and the victim hollers, 'Hate crime!'" Jacob Sullum, *What's Hate Got to Do with It? Do Crimes of Bigotry Deserve Extra Punishment?* Reason, Dec. 1992, at 14, 16 (quoting Joe Roy, chief investigator for Klanwatch).

Ironically, abuse of this discretion is particularly invited in the case of minority community leaders and minority rights activists, whenever they inconvenience or criticize the government. Section 939.645 may have been conceived with the idea of helping minorities, but it is minorities who most of all need the First Amendment's protection of the freedom of opinion.

III. WISCONSIN STATUTES SECTION 939.645 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT IT IMPERMISSIBLY DISCRIMINATES AMONG PERSONS BASED UPON EXERCISE OF THEIR FUNDAMENTAL RIGHTS OF BELIEF AND EXPRESSION AND IS NOT PRECISELY TAILORED TO SERVE A COMPELLING STATE INTEREST.

A statute that treats persons differently based upon exercise of First Amendment rights is "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). A reviewing court must apply strict scrutiny to determine whether such a statute is "precisely tailored to serve a compelling

governmental interest." *Id.* Strict scrutiny of Section 939.645 reveals its constitutional flaws. The statute treats persons differently based upon their constitutionally protected thoughts and beliefs. Someone who commits any underlying offense because of some motive not singled out for condemnation may not be punished anywhere near as severely as may one who commits the same offense because of one of the statutorily enumerated biases. The factors which determine whether one defendant receives a shorter or a longer sentence than another defendant are the content and the viewpoint of the defendants' thoughts. This disparate treatment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The State of Wisconsin has no compelling governmental interest in the regulation of bigoted thoughts. Moreover, the State has no interest in differentiating among persons based upon those persons' thoughts and beliefs, no matter how offensive those thoughts and beliefs may be. This equal protection analysis is consistent with the First Amendment analysis. In fact, this Court has, on occasion, "fused" the two. See *R.A.V.* at 2544 n. 4. In *Carey v. Brown*, 447 U.S. 455 (1980), this Court quoted its earlier findings in *Police Department v. Mosley*, 408 U.S. 92 (1972), "... Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 447 U.S. at 462-63(citation omitted). The Court quoted further, " '...under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views ... [G]overnment must afford all points of view an equal opportunity to be heard.' " *Id.* at 463.

The Equal Protection Clause prohibits disparate treatment of similarly situated individuals based upon their thoughts, ideas, or viewpoints. Wisconsin could not treat similarly situated authors differently based on the content of their work, nor similarly situated parade permit applicants differently based on their viewpoint and the anticipated response of others. *Forsyth County, Georgia v. Nationalist Movement,* 112 S. Ct. 2395 (1992). Likewise, the Equal Protection Clause forbids Wisconsin from treating similarly situated offenders differently based upon their viewpoints or the anticipated response of others. The focus on content and viewpoint as the basis of the disparate treatment offends the equal protection principles in the same manner irrespective of the individual's activity. Just as Section 939.645 fails the strict scrutiny analysis under the First Amendment, it also fails under the Equal Protection Clause.

Intolerance of differences among people is deplorable in private citizens. It is unconstitutional in government. Just as individuals may not commit crimes based on their intolerance of those who differ from them, government cannot act on its intolerance of people with certain beliefs, even bigoted beliefs. Thus, laws like Section 939.645 are as unjust as the acts they are designed to prevent, and for the same reasons. "By punishing opinions, hate-crime laws institutionalize the very bigotry they seek to prevent: They treat some individuals as second-class citizens simply because of the ideas they hold." Sullum, *supra*, at 18. Wisconsin may constitutionally espouse the view that bigotry is wrong and destructive, and brotherhood is good, in the same way it may espouse the view that communism is bad and destructive, and patriotism is good. But just as it may not punish disagreement about communism by enhancing penalties for offenses motivated by communism, Wisconsin may not punish disagreement about bigotry by enhancing penalties for offenses motivated by bigotry.

CONCLUSION

This case does not present this Court with the unappealing task of choosing between the interests of equality and those of civil liberties. Neither Respondent nor his amici are asking this Court to abandon its longstanding tradition of protecting Americans from the evils of invidious discrimination. But this case is not about discrimination, it is about the constitutionally protected thoughts of a man who committed a criminal offense.

The State concedes that it cannot punish Todd Mitchell for his bigotry alone, Brf. Pet. at 13, and his criminal conduct is already punishable under other Wisconsin laws. Had the State chosen to punish Todd Mitchell for his conduct alone, this case would not be before this Court. But the State has chosen to punish him for his thoughts as well. Mr. Mitchell's thoughts cannot protect him from punishment for his illegal conduct. However, his conduct cannot enable the State to subject him to additional punishment for those thoughts.

A decision in favor of Todd Mitchell would not be a defeat for equality. It would be an affirmation of that valued ideal. The very concept of equality is a product of the free minds of men and women. The progress we have made toward equality has been made possible by freedom of thought. This Court can continue that progress and, at the same time, protect fundamental First Amendment rights by affirming the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

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